Captain Ho Fooi v Standard Chartered Bank Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-03–220 OF 2004
RAUS SHARIF, AHMAD MAAROP AND SULAIMAN DAUD JJCA
13 APRIL 2009

Bankruptcy — Interest — Calculation of interest — Whether prejudgment interest caught by six-year limitation period under s 6(3) of the Limitation Act 1953 — Limitation Act 1953 s 6(3)

Bankruptcy — Notice — Validity of — Allegation by debtor that excess amount claimed by creditor — Debtor failing to challenge validity of bankruptcy notice within seven day period — Whether debtor's challenge on appeal proper

Bankruptcy — Petition — Opposition to petition — Debtor's notice of intention to oppose petition challenging creditor's petition and bankruptcy notice — Whether proper

Limitation — Action upon judgment — Interest, recovery of — Reckoning of limitation period — Whether six-year limitation period under s 6(3) of the Limitation Act 1953 applicable to prejudgment interest

The creditor had obtained judgment against the debtor for a principal amount, plus pre and post judgment interest on 1 September 1995. The judgment sum remained outstanding and the creditor commenced bankruptcy proceedings against the debtor. The bankruptcy notice was personally served on the debtor on 13 October 1996 and the creditor's petition ('the petition') was subsequently filed against the debtor. When the petition eventually came up for hearing, counsel for the debtor filed a notice of intention to oppose the petition, based on several grounds. The debtor thereafter filed an affidavit denying service of the petition. He also filed a notice of intention to cross-examine the deponent of the affidavit of service, which notice was later withdrawn. On 12 February 1998, the deputy registrar dismissed the petition with costs. The creditor appealed to the judge. The debtor however, filed an application by way of summons in chamber praying, inter alia, for the same relief that was obtained through the deputy registrar's order of 12 February. The judge allowed the creditor's appeal and entered receiving and adjudicating orders against the debtor. The debtor thus appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) It was obvious that the debtor through his notice of intention to oppose the petition intended not only to challenge the creditor's petition but also to set aside the bankruptcy notice. The debtor had however, adopted the wrong mode of challenging the service of the bankruptcy notice and the creditor's petition, as well as the contents of the bankruptcy notice. The debtor's application by way of summons in chambers was a blatant act to remedy the fatal procedural requirement defect, which application was in any case redundant (see paras 16 & 20); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 distinguished and *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd* [2004] 1 MLJ 1; [2003] 4 CLJ 34 referred.

(2) In the instant case, there was a clear admission by the debtor that he was personally served with the bankruptcy notice. Concerning the service of the creditor's petition, the judge found that the petition had been personally served upon the debtor. The judge had not erred in the decision he made on the issue and the Court of Appeal would be reluctant to reject his finding of fact (see paras 23–25); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 and *Watt v Thomas* [1947] AC 484 referred.

(3) In the instant case, the debtor had not challenged the validity of the bankruptcy notice by reason of excess amount within the prescribed seven-day period under the Bankruptcy Act 1967. Thus his appeal on this ground ought to fail (see paras 32–33); *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 and *Wee Chow Yoong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 followed; *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142 and *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426 distinguished.

(4) The debtor's argument that the interest claimed in the bankruptcy notice had exceeded the six-year limitation period under s 6(3) of the Limitation Act 1953 was without merit. The interest complained about was prejudgment interest that had merged into the judgment debt and entitled the creditor to claim for it. The limitation under s 6(3) of the Limitation Act 1953 only applies to post judgment interest and not to prejudgment interest (see para 41); *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 and *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 followed.

[Bahasa Malaysia summary

Pemiutang telah mendapatkan penghakiman terhadap penghutang untuk

jumlah pokok, ditambah faedah sebelum dan selepas penghakiman pada 1 September 1995. Jumlah penghakiman masih belum dijelaskan dan pemiutang memulakan prosiding kebankrapan terhadap penghutang. Notis kebankrapan telah disampaikan sendiri kepada penghutang pada 13 Oktober 1996 dan petisyen penghutang ('petisyen') kemudiannya difailkan terhadap penghutang. Apabila petisyen ditetapkan untuk perbicaraan, peguam kepada penghutang memfailkan notis menyatakan hasrat untuk menentang petisyen, berdasarkan beberapa alasan. Penghutang selanjutnya memfailkan satu afidavit menafikan penyampaian petisyen. Dia juga memfailkan notis menyatakan hasrat untuk memeriksa balas deponen afidavit penyampaian, yang kemudiannya ditarik balik. Pada 12 Februari 1998, timbalan pendaftar telah menolak petisyen dengan kos. Pemiutang merayu kepada hakim. Pemiutang bagaimanapun, memfailkan permohonan melalui saman dalam kamar menuntut, antara lain, relief yang sama yang diperoleh melalui perintah timbalan pendaftar bertarikh 12 Februari. Hakim membenarkan rayuan pemiutang dan memasukkan perintah penerimaan dan penghukuman terhadap penghutang. Oleh itu penghutang merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Jelas bahawa penghutang melalui notis menyatakan cadangan untuk menentang petisyen bertujuan bukan hanya untuk mencabar petisyen pemiutang tetapi juga untuk mengetepikan notis kebankrapan. Penghutang bagaimanapun, menggunakan cara yang salah untuk mencabar penyampaian notis kebankrapan dan petisyen penghutang, begitu juga dengan isi kandungan notis kebankrapan. Permohonan penghutang melalui saman dalam kamar merupakan tindakan yang secara jelas untuk mengatasi kecacatan teruk keperluan prosedur, yang mana permohonan tersebut tidak diperlukan (lihat perenggan 16 & 20); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 dibeza dan *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd* [2004] 1 MLJ 1; [2003] 4 CLJ 34 dirujuk.

(2) Dalam kes ini, terdapat pengakuan yang jelas daripada penghutang bahawa dia disampaikan sendiri dengan notis kebankrapan. Berkenaaan penyampaian petisyen penghutang, hakim mendapati bahawa petisyen tersebut telah disampaikan sendiri kepada penghutang. Hakim tidak melakukan kesilapan dalam keputusan yang dibuat berkenaan isu tersebut dan Mahkamah Rayuan keberatan untuk menolak penemuan faktanya (lihat perenggan 23–25); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 dan *Watt v Thomas* [1947] AC 484 dirujuk.

(3) Dalam kes ini, penghutang tidak mencabar kesahan notis kebankrapan dengan alasan jumlah berlebihan dalam jangkamasa tujuh hari di bawah Akta Kebankrapan 1967. Oleh itu rayuannya atas alasan ini sepatutnya gagal (lihat perenggan 32–33); *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 dan *Wee Chow Yoong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 diikut; *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142 dan *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426 dibeza.

(4) Hujah penghutang bahawa faedah yang dituntut dalam notis kebankrapan telah melebihi had masa enam tahun di bawah s 6(3) Akta Had Masa 1953 adalah tanpa merit. Faedah yang diadukan adalah mengenai faedah pra-penghakiman yang digabungkan ke dalam hutang penghakiman dan melayakkan pemiutang untuk menuntutnya. Had masa di bawah s 6(3) Akta Had Masa 1953 hanya terpakai kepada faedah selepas penghakiman dan bukan kepada faedah pra-penghakiman (lihat perenggan 41); *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 dan *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 diikut.]

Notes

For cases on calculation of interest, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2350–2351.

For cases on opposition of petition, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2662–2679.

For cases on recovery of interest, action upon judgment generally, see 9 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1910–2254.

For cases on validity of bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2350–2351.

Cases referred to

Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd [2004] 1 MLJ 1; [2003] 4 CLJ 34, CA (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298, SC (refd)

Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724, FC (folld)

Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal [1991] 1 MLJ 426, SC (distd)

Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals [1989] 2 MLJ 142, SC (distd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

A *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Sdn Bhd* [2002] 1 MLJ 385, FC (distd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253, FC (folld)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ
B 385, FC (folld)
Watt v Thomas [1947] AC 484, HL (refd)
Wee Chow Yoong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508, HC (folld)

C **Legislation referred to**
Bankruptcy Act 1967 s 3(1)(i), (2) proviso (ii)
Bankruptcy Rules 1969 rr 18(1), 95(1), 117, Forms 7, 16
Limitation Act 1953 s 6(3)
Rules of the Court of Appeal 1994 r 18(4)(d), (7)

D

Appeal from: Bankruptcy No 29–2261 of 1996 (High Court, Shah Alam)

JS Gill (Putra Gill) for the appellant.
E *Ahmad Budiman (Ho Loke Koh) for the respondent.*

Sulaiman Daud JCA (delivering judgment of the court):

F **[1]** This is an appeal from the decision of the learned judge of the High Court at Shah Alam allowing the respondent creditor's appeal against the order of the deputy registrar in setting aside its creditor's petition. After hearing submissions of counsel from both parties, we dismissed the appeal with costs. We now give our reasons for the decision.

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[2] On 1 September 1995 the respondent creditor ('the creditor') obtained a judgment against the appellant debtor ('the debtor') in the sessions court for the principal sum of RM33,155.58 together with interest at the rate of 0.067% per day from 5 December 1986 to the date of judgment and 8%pa
H from the date of judgment to the date of full settlement, plus late payment charge of RM12 per month to the date of full settlement and costs ('the judgment debt'). The debtor failed to pay the judgment debt or any part thereof.

I THE BANKRUPTCY PROCEEDINGS

[3] On 12 August 1996, the creditor issued to the debtor a bankruptcy notice claiming the judgment debt for the total sum of RM112,025.01 comprising the outstanding principal sum and interest together with late

charge and costs. The bankruptcy notice was personally served on the debtor on 13 August 1996 at his residential address No 53, Jalan 4M, Ampang Jaya 68000, Selangor ('the said address'). A

[4] Subsequently on 13 November 1996, the creditor filed the creditor's petition alleging failure by the debtor to comply with the requirements of the bankruptcy notice within the time stipulated therein. The petition was made returnable before the court on 9 October 1997. B

[5] When the matter was called for hearing before the deputy registrar on 9 October 1997, the debtor was not ready to proceed and applied for an adjournment to engage counsel. The application was allowed and the proceedings was adjourned to 8 January 1998. C

[6] At the adjourned hearing on 8 January 1998, Mr JS Gill, counsel for the debtor, filed a 'notice by the debtor of intention to oppose the petition' ('notice of intention to oppose the petition') setting out three grounds as follows: D

(a) first, he complained that the bankruptcy notice and the creditor's petition have not been properly served on him; E

(b) second, he claimed that the calculation of late charge which included the month of August 1996 is incorrect as the bankruptcy notice was only filed on 12 August 1996;

(c) third, he alleged that the bankruptcy proceedings are irregular. F

[7] The deputy registrar, on the application of the debtor's counsel, further adjourned the hearing of the creditor's petition to 12 February 1998.

[8] Prior to the hearing date on 12 February 1998, the debtor had, on 4 December 1998, filed an affidavit denying service of the creditor's petition on him ('the debtor's affidavit'). He averred that at the time of the alleged service he was in Penang and not at home. The debtor also filed a notice of intention to cross-examine the deponent of the affidavit of service which was later withdrawn. G H

[9] At the hearing on 12 February 1998, the deputy registrar, having considered the creditor's petition, the notice of intention to oppose the petition and the debtor's affidavit, made an order dismissing the petition with costs ('the said order'). The creditor appealed to the judge in chambers against the decision. I

[10] Despite the said order, the debtor still proceeded to file an application by way of summons in chambers dated 25 May 1998 praying, inter alia, for the same relief that was earlier granted in the said order.

[11] The creditor's appeal to the judge in chambers was heard on 30 July 2004, whereby the learned judge allowed the appeal and made the receiving and adjudicating orders against the debtor, and hence this appeal.

[12] Based on the grounds raised in the memorandum of appeal and submission of learned counsel for both parties, we are of the view that the present appeal may be disposed of upon the determination of the following issues, namely:

(a) whether the filing of notice by debtor of intention to oppose the petition complied with the requirements of the Bankruptcy Rules 1969 ('the Rules');

(b) whether the bankruptcy notice and the creditor's petition were personally served on the debtor;

(c) whether the bankruptcy notice is void for not stating the exact amount due at the date of the notice; and

(d) whether the interest claimed exceeded the limitation period of six years.

NOTICE BY DEBTOR OF INTENTION TO OPPOSE THE PETITION, WHETHER IN COMPLIANCE WITH THE RULES

[13] From the grounds of judgment, it is apparent to us that the learned judge had rejected the notice of intention to oppose the petition on three grounds. First, he held that the filing and service of the said notice on the day fixed for hearing of the petition contravened r 117 of the Rules which requires the same to be filed at least three days before such hearing date. Secondly, he found that the said notice which also sought to challenge the content of the bankruptcy notice was not filed within seven days as required by the Rules. Thirdly, he also found that the notice of intention to oppose the petition was not the proper mode of challenging the matters stated therein.

[14] Before us, Mr JS Gill submitted that the learned judge in coming to such a decision had put too much emphasis on the technical and procedural non-compliance with the requirements of the Rules rather than the merit of the debtor's case. On this issue of procedural technicalities, learned counsel referred to the Federal Court case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Sdn Bhd* [2002] 1 MLJ 385, where the court allowed the appellant's appeal against the decision of the Court of Appeal in allowing the respondent's preliminary objection grounded on

defectiveness of the appeal record for non-compliance with r 18(4)(d) and (7) of the Rules of the Court of Appeal 1994.

[15] The notice of intention to oppose the petition, in so far as relevant, reads as follows:

> I, the above Captain Ho Fooi, do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt on the following grounds:
>
> (i) The Bankruptcy Notice and/or Creditor's Petition have not been properly served on me.
>
> (ii) The calculation of late charge is incorrect. The judgment creditor is claiming late charge of RM12.00 for the month of August 1996 when the Bankruptcy Notice was only filed on 12 August 1996. The amount for late charge should not include the month of August 1996 as it has not been completed, ie the correct amount should be RM1,380.00 and not RM1,392.00 as stated.

[16] From the content thereof, it is obvious to us that the debtor by way of such notice not only seeks to challenge the creditor's petition but also to set aside the bankruptcy notice. As pointed out by this court in *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd* [2004] 1 MLJ 1; [2003] 4 CLJ 34, there are two stages in a bankruptcy proceedings, namely, the notice stage and the petition stage. The Rules also provide for different modes or procedures in opposing or challenging a bankruptcy notice and a creditor's petition.

[17] Rule 18(1) provides that every application to the court in a bankruptcy matter shall be made by summons in chambers supported by affidavit, save where otherwise provided by the Act or the Rules. The procedure for setting aside a bankruptcy notice is governed by r 95(1) which only requires the applicant to file an affidavit in Form 7 stating either he has satisfied the judgment debt in question, or that he has a counterclaim or set-off in the sum equal to or exceeding the claim. At the creditor's petition stage, if the debtor intends to show cause against the petition he is required under r 117 to file a notice in Form 16 to the registrar specifying the statements in the petition which he intends to deny or dispute and transmit a copy thereof to the creditor three days before the day on which the petition is to be heard.

[18] In *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd*, this court has expressed the view that the notice to oppose the petition under r 117 is only

applicable in cases where a debtor intends to show cause against the petition. In the said notice he has to specify the statement in the petition which he intends to deny or dispute.

[19] In *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298, the appellant debtor filed an affidavit in opposition containing 19 paragraphs attacking the bankruptcy notice and raising several grounds why the creditor's petition should be dismissed. The court held that the said affidavit containing multitude of grounds other than the existence of a counterclaim or set-off or cross demand (being the ground for setting aside a bankruptcy notice) render his affidavit in opposition ineffective and bad in law. Similarly, by analogy, we are of the view that the filing of the notice to oppose the petition herein for purposes other than 'to deny or dispute' the statement in the petition will also render the said notice ineffective and bad in law. In our view the fact in *Megat Najmuddin*, is easily distinguishable as it only relates to the irregularities in the filing of appeal record.

[20] With regard to the filing of the said summons in chambers, we agree with the learned judge that it was 'a blatant act of the debtor to remedy the fatal defect of procedural requirement'. We are also in agreement with the learned judge that the said summons were redundant as the deputy registrar had, on 12 February 1998 dismissed the creditor's petition, being the like prayer sought in the summons.

[21] For the reasons aforesaid, we agree with the finding of the learned judge that the debtor by filing the notice of intention to oppose the petition had adopted the wrong mode of challenging the service of the bankruptcy notice and the creditor's petition, as well as the content of the bankruptcy notice. The appeal on these two issues may be dismissed on this ground alone. However, for completeness, we will proceed to consider the merit of each of the grounds raised in this appeal.

BANKRUPTCY NOTICE, ETC, WHETHER PERSONALLY SERVED

[22] With regard to the service of the bankruptcy notice, the learned judge, upon evaluation of the evidence before him, concluded as follows:

> The judgment debtor's contention regarding non-service of the bankruptcy notice upon him personally must also failed as he had, in his affidavit affirmed on 4 January 1998 admitted to the effect of having personally been served with the bankruptcy notice. He cannot now dispute as to the receipt of it, leaving behind his credibility as a bona fide judgment debtor questioned.

[23] We are satisfied, upon perusal of the said affidavit, that there was a clear admission by debtor that he was personally served with the bankruptcy notice.

[24] On the question of service of the creditor's petition, the learned judge found that the same has been personally served on the debtor. He based his finding on three grounds. First, he accepted the affidavit of service affirmed by one Noorhaidi bin Mohd Noor Rahim that he had on 14 June 1997 effected personal service of the petition to the debtor. Secondly, he questioned the bona fide of the debtor in disputing service of the petition as he had also alleged the non-service of the bankruptcy notice which is in clear contradiction with his admission on the receipt of the same in his subsequent affidavit. Thirdly, he was of the view that the act of the debtor in withdrawing the notice of intention to cross-examine the deponent of the affidavit of service showed 'his lack of conviction towards this motion raised by him'.

[25] It is trite law that the Court of Appeal is reluctant to reject a finding of fact by a trial court. Generally, the court will not intervene unless the trial court is shown to be plainly wrong in arriving at its decision (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, *Watt v Thomas* [1947] AC 484). Having considered the grounds on which the learned judge based his finding, we are satisfied that he has not erred in the decision he made on this issue to warrant any appellate intervention.

CHALLENGE ON THE CALCULATION OF THE LATE CHARGE

[26] This is the second ground raised in the notice of intention to oppose the petition. Counsel for the debtor referred to the bankruptcy notice where a late charge of RM12 per month was imposed from January 1987 to August 1996. It is submitted that since the bankruptcy notice was filed on 12 August 1996, the late charge of RM12 for the full month of August has been wrongly included in the amount due under the bankruptcy notice. By reason thereof, it is argued that the bankruptcy notice is invalid and void ab initio, and consequently the creditor's petition, which also sets out the same sum as in the bankruptcy notice, is also invalid.

[27] In support of his submission, learned counsel referred to the case of *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142, where it was held that a bankruptcy notice which did not quantify the interest sums to be invalid ab initio and consequently all subsequent proceedings relating thereto are a nullity. We were also referred to another Supreme Court case of *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426, where a bankruptcy notice was

also held to be invalid on the ground that it included claim for interest to date of realisation which could not be ascertained or determined at the date of the notice.

[28] In our view the two cases aforesaid are distinguishable as the facts showed that the bankruptcy notices only stated the rate of interest but did not quantified the interest sums payable, whereas in the present appeal the interest sums payable was specifically set out in the bankruptcy notice. It was only contended that the sum so specified exceeded the amount actually due at the date of filing of the bankruptcy notice as it included interest in respect of late charge of RM12 for the month of August 1996 which was not due at the time of such filing.

[29] Proviso (ii) to s 3(2) of the Bankruptcy Act 1967 ('the Act') provides that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice.

[30] In the present appeal, the bankruptcy notice was personally served on the debtor on 13 October 1996. There was no notice given by the debtor to the creditor that he disputed the validity of the notice by reason of excess amount within the stipulated seven days' period. By reason thereof the debtor would have committed an act of bankruptcy after the expiry of seven days from the date of service by virtue of s 3(1)(i) of the Act.

[31] It is trite law that any challenge to the validity of a bankruptcy notice on the ground that the amount stated therein exceeds the amount actually due must be made within the time prescribed in the said notice as required by the aforesaid proviso. In *Wee Chow Yoong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, the debtor sought to impugn a bankruptcy notice on several grounds. It was contended, as one of the grounds, that the sum specified in the notice as being due by way of interest included interest not recoverable under s 6(3) of the Limitation Act 1953, being interest after the expiry of the six years limitation for recovery of the same. The court dismissed the objection as the seven-day period stipulated in the bankruptcy notice for disputing the amount due had expired.

[32] In *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724, the debtor filed an affidavit opposing the petition contending that the bankruptcy notice was invalid on the ground that the interest specified was wrongly calculated. In that case the bankruptcy notice was issued on 14 June 1991 and the affidavit opposing the petition contending the bankruptcy notice was invalid on that ground was filed on

18 February 1992. Mohamed Dzaiddin FCJ (as he then was), in delivering the decision of the Federal Court said, at p 733:

> … what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to s 3(2) of the Act, …

[33] Based on the aforesaid authorities, the appeal on this ground must necessarily fail.

WHETHER INTEREST EXCEEDS THE LIMITATION PERIOD OF SIX YEARS

[34] Learned counsel for the debtor pointed out that the calculation of interest in the bankruptcy notice was for a period 3,193 days from 5 December 1986 to 1 September 1995. By reason thereof it is contended that the bankruptcy notice is invalid as it included interest which exceeded the six years limitation as provided under s 6(3) of the Limitation Act 1953. It is pertinent to note that this issue was neither canvassed before the deputy registrar nor the learned judge on appeal. However this court had earlier allowed the debtor to amend the memorandum of appeal to raise this new point.

[35] The judgment to which the bankruptcy notice relates was obtained on 1 September 1995. That part of the judgment which is relevant to the calculation of interest is reproduced as follows:

> MAKA ADALAH PADA HARI INI DIHAKIMI bahawa Defendan hendaklah membayar kepada Plaintif jumlah sebanyak RM33,155.58 dengan faedah atas jumlah tersebut pada kadar 0.067% sehari dari 5 haribulan Disember, 1986 sehingga tarikh Penghakiman dan kemudiannya faedah pada kadar 8% setahun dari tarikh Penghakiman sehingga tarikh penyelesaian sepenuhnya, ...

[36] Whereas the particulars of debt as set out in the bankruptcy notice are as follows:

Decretal Amount	RM33,155.58
Interest at the rate of 0.067% per day on RM33,155.58 from 05.12.86 to 01.09.95 (x 3,193 days)	RM70,930.06
Interest at the rate of 8% per annum on RM33,155.58 from 02.09.95 to 12.08.96 (x 346 days)	RM 70,930.06

Late charge of RM12.00 per month from Jan. '87 to Aug. '96 (x116 mths)	RM 1,392.00
Costs	RM 4,033.00
	RM112,025.01
Paid into account	NIL
Amount due	RM112,025.01

[37] From the aforesaid particulars, it is apparent to us that the interest claimed for 3,193 days from 5 December 1986 to 1 September 1995 was for the period before judgment, while that claimed for 346 days from 2 September 1995 to 12 August 1996 was for the period after judgment.

[38] The limitation period for the recovery of interest in respect of a judgment debt as provided under s 6(3) of the Limitation Act reads as follows:

> (3) An action upon a judgment debt shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[39] In *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385, the Federal Court was posed with question on the proper construction of s 6(3) of the Limitation Act, in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'. Abdul Malek Ahmad JCA (as he then was) in delivering the judgment of that court said, at p 397, as follows:

> … we would hold that it is obvious that the second limb of s 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due …

[40] From the aforesaid authority, it is obvious to us that for the purpose of computing the six-year limitation period under s 6(3) of the Limitation Act 1953 for the recovery of interest in respect of a judgment debt, time begins to run from the date of judgment. Such limitation only applies to a post judgment interest and not to pre-judgment interest. In the present appeal the judgment to which the bankruptcy notice relates was obtained on 1 September 1995 and the recovery of arrears of interest was only made until 12 August 1996, which was well within the six years limit prescribed for the recovery thereof.

[41] With regard to the interest in respect of the period of 3,193 days as raised by learned counsel, it also apparent to us that it was a prejudgment interest. In *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 it was held that the interest calculated prior to the date of the judgment merged into the judgment debt, and therefore the creditor would be entitled to recover the same. For the reasons aforesaid, the appeal on this ground is also devoid of merit.

[42] Each of the grounds of appeal having failed, we unanimously dismissed the appeal with costs. The decision of the learned judge is hereby affirmed. Deposit to the creditor to account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon